

******DRAFT 12-09******
STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CRIMINAL PROCEDURE

Effective: -----, 2010

All the justices concurring therein, the following amendments to the Maine Rules of Criminal Procedure are hereby adopted to be effective on the date indicated above. The specific rules amendments are stated below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending each amendment, but it is not part of the amendment adopted by the Court.

1. Rule 1, subdivision (b), of the Maine Rules of Criminal Procedure is amended as follows:

(b) Scope. These rules govern the procedure in:

(1) *The Superior Court:*

(A) in all criminal proceedings, including appellate and post-conviction review proceedings, ~~and a proceeding on a post-conviction motion for DNA analysis;~~ and a proceeding on a post-judgment motion by a person whose identity has been stolen and falsely used; and

(B) in a juvenile crime appellate proceeding.

(2) *The District Court:*

- (A) in all criminal proceedings, including extradition proceedings, ~~and~~ in a proceeding on a post-conviction motion for DNA analysis, and a proceeding on a post-judgment motion by a person whose identity has been stolen and falsely used;
- (B) in proceedings before justices of the peace and bail commissioners; and
- (C) in juvenile crime proceedings to the extent consistent with the Maine Juvenile Code.

These rules are not applicable to forfeiture of property for a violation of a statute of the State of Maine or the collection of fines and penalties. These rules are not applicable to revocation proceedings under title 17-A, sections 1205 and 1207, section 1233 or sections 1349-D through 1349-F except to the extent and under the conditions stated in those sections.

Advisory Note – January 2010

M.R. Crim. P. 1(b). The amendment adds a reference in both subparagraph (A) of paragraph (1) and subparagraph (A) of paragraph (2) to new Part XIII containing 5 new rules (105-109) addressing the new statutory post-judgment relief mechanism for persons whose identities have been stolen and falsely used by another person in a criminal proceeding. *See*, M.R.S. ch. 308 [§§ 2181-2184], enacted by P.L. 2009, ch. 287, § 1, effective September 12, 2009. *See also* Advisory Note – 2010 to M.R. Crim. P. Part XIII and Rules 105-109.

2. Rule 11 of the Maine Rules of Criminal Procedure is amended as follows:

RULE 11. PLEAS; ACCEPTANCE OF A PLEA TO A CHARGE OF A CLASS C OR HIGHER CRIME; SPECIAL CIRCUMSTANCES AS TO ACCEPTANCE OF CERTAIN PLEAS; NOTICE AS TO POSSIBLE IMMIGRATION CONSEQUENCES

(a) Pleas for any crime.

(1) *In General.* A defendant may plead not guilty, not criminally responsible by reason of insanity, guilty, or nolo contendere. A defendant may plead both not guilty and not criminally responsible by reason of insanity to the same charge.

The court may refuse to accept a plea of guilty or nolo contendere.

If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or nolo contendere, the court shall enter a plea of not guilty.

(2) *Conditional Plea.* With the approval of the court and the consent of the attorney for the state, a defendant may enter a conditional plea of guilty or nolo contendere. A conditional plea shall be in writing. It shall specifically state any pretrial motion and the ruling thereon to be preserved for appellate review. If the court approves and the attorney for the state consents to entry of the conditional plea of guilty or nolo contendere, the parties shall file a written certification that the record is adequate for appellate review and that the case is not appropriate for application of the harmless error doctrine. Appellate review of any specified ruling shall not be barred by the entry of the conditional plea.

If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.

~~(3) *Fine on Acceptance of Guilty Plea in District Court.* The District Court clerk may, at the signed request of the defendant, accept a guilty plea upon payment of a fine as set by the judge in the particular case or as set by the judge in accordance with a schedule of fines established by the judge with the approval of the Chief Judge for various categories of such crimes.~~

(b) Prerequisites to Accepting a Plea of Guilty or Nolo Contendere to a Class C or Higher Crime. In all proceedings in which the crime charged is murder or a Class A, Class B, or Class C crime, before accepting a plea of guilty or nolo contendere, the court shall ensure:

- (1) That the plea is made with knowledge of the matters set forth in subdivision (c);
 - (2) That the plea is voluntary within the meaning of subdivision (d);
 - (3) That there is a factual basis for the charge, as provided in subdivision (e);
- and
- (4) That an unrepresented defendant has waived the defendant's right to counsel.

(c) Insuring That the Plea Is Made Knowingly. Before accepting a plea of guilty or nolo contendere in a case involving a Class C or higher crime, the court shall address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The elements of the crime charged, the maximum possible sentence and any mandatory minimum sentence; and

(2) That by pleading guilty or nolo contendere the defendant is relinquishing the right to a trial, at which the defendant would have the following rights:

(A) The right to be considered innocent until proven guilty by the state beyond a reasonable doubt; and

(B) The right to a speedy and public trial by the court or by a jury; and

(C) The right to confront and cross-examine witnesses against the defendant; and

(D) The right to present witnesses on the defendant's behalf and the right to either be or decline to be a witness on the defendant's behalf.

(d) Insuring That the Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere in a case involving a Class C or higher crime, the court shall determine that the plea is the product of the defendant's free choice and not the result of force, threats or promises other than those in connection with a plea agreement.

The court shall make this determination by addressing the defendant personally in open court.

The court shall inquire as to the existence and terms of a plea agreement, as provided in Rule 11A.

(e) Insuring That There Is a Factual Basis for the Plea. Before accepting a plea of guilty or nolo contendere in a case involving a Class C or higher crime, the court shall make such inquiry of the attorney for the state as shall satisfy it that the state has a factual basis for the charge.

(f) Acceptance of a Plea of Guilty to a Class C or Higher Crime in District Court. A defendant who, prior to indictment, desires to enter a plea of guilty in the District Court to a charge of a Class A, B, or C crime may in writing waive the defendant's right to appearance and trial in the Superior Court and may waive indictment as provided in Rule 7(b).

If the court refuses to accept the plea or the defendant, after executing the waivers, declines to plead guilty or if a plea of guilty is set aside, the waivers shall be considered withdrawn and the case shall proceed in accordance with these rules as if no waivers had been filed.

All proceedings in the District Court shall be reported in such manner that an accurate transcript of the proceedings can be made. Such reporting may be done by means of electronic recording equipment.

(g) Transfer for Plea and Sentence. The defendant may, in writing, if a criminal charge for any crime is currently pending in a court, request permission to plead guilty or nolo contendere to any other crime the defendant has committed in the state, subject to the written approval of the attorneys for the state, if more than

one. Upon receipt of the defendant's written statement and of the written approval of the attorneys for the state the clerk of the court in which a complaint, an indictment or an information is pending shall transmit the papers in the proceeding to the clerk of courts for the court in which the defendant is held, and the prosecution shall continue in that court. The defendant's plea of guilty or nolo contendere constitutes a waiver of venue.

The court receiving a case transferred for plea and sentence shall issue an order that either requires the case to remain in the sentencing court or requires the case to be returned to the originating court.

(h) Fine on Acceptance of Guilty Plea in District Court. The District Court clerk may, at the signed request of the defendant, accept a guilty plea upon payment of a fine as set by the judge in the particular case or as set by the judge in accordance with a schedule of fines established by the judge with the approval of the Chief Judge for various categories of such crimes.

(h)(i) Immigration Consequences of the Plea. Before accepting a plea of guilty or nolo contendere for any crime, the court shall inquire whether the defendant is a United States citizen. If the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been notified that there may be immigration consequences of the plea. If no such notification has been made, or if the defendant is unrepresented, the court shall notify the defendant that

there may be immigration consequences of the plea and may continue the proceeding for investigation and consideration of the consequences by the defendant. The court is not required or expected to inform the defendant of the nature of any immigration consequences.

Advisory Note – 2010

M.R. Crim. P. 11. The amendment makes a number of nonsubstantive changes to the Rule, all designed solely to enhance clarity. Specifically, it: (1) adds a reference in the Rule heading to “**SPECIAL CIRCUMSTANCES AS TO ACCEPTANCE OF CERTAIN PLEAS**” to alert the reader to the existence of subdivisions (a)(3) [redesignated subdivision (h)], (f) and (g); (2) adds “for any crime” in the heading of subdivision (a); (3) moves the special circumstance addressed currently in subdivision (a)(3) to a new subdivision designated (h); (4) adds the phrase “in a case involving a Class C or higher crime” to the first sentence of subdivisions (c), (d) and (e); (5) adds “for any crime” in the first sentence of subdivision (g); and (6) redesignates current subdivision (h), subdivision (i).

3. Rule 11B, subdivision (a), of the Maine Rules of Criminal Procedure is amended as follows:

(a) **In General.** The attorney for the state and the defendant may enter into a written filing agreement respecting a pending indictment, information or complaint. The filing agreement must establish a definite filing period of up to one year subject to the conditions, if any, set forth in the filing agreement. Upon execution of the agreement by the parties the agreement must be filed forthwith in the trial court and, upon such filing, the agreement becomes operational.

Advisory Note – January 2010

M.R. Crim. P. 11B(a). The amendment adds a new final sentence that both imposes upon the parties the obligation to file the written agreement forthwith once executed and signifies when such executed agreement becomes operational—namely, when it is filed in the trial court and not before.

4. Rule 24, subdivision (c), paragraphs (2) and (3) of the Maine Rules of Criminal Procedure are amended as follows:

(2) *Order of Exercise.* Peremptory challenges shall be exercised one by one, ~~alternatively~~ alternately, with the state exercising the first challenge. If there is more than one defendant,and the court may allow ~~allows~~ the defendants additional peremptory challenges,as specified in paragraph (3), the court may permit the additional challenges to be exercised separately or jointly, and determine the order of the challenges.

(3) *Number.* If the crime charged is ~~murder~~ punishable by life imprisonment, each side is entitled to 10 peremptory challenges. If the crime charged is a Class A crime not punishable by life imprisonment, a Class B crime, or a Class C crime, each side is entitled to 8 peremptory challenges. In all other criminal prosecutions each side is entitled to 4 peremptory challenges. If there are 2 or more defendants, the court may allow each side additional peremptory challenges.

Advisory Notes – 2010

M.R. Crim. P. 24(c)(2) and (3). The amendment modifies paragraph (2) of subdivision (c) in two respects. In the first sentence the word “alternatively” is replaced by the word “alternately.” In the second sentence, that portion addressing the court’s authority to allow additional peremptory challenges in the event of multiple defendants has been moved to paragraph (3) as a new final sentence since paragraph (3) addresses the number of peremptory challenges authorized. That portion of the second sentence addressing how and the order of exercising any additional peremptory challenges provided to multiple defendants is retained in paragraph (2) with new introductory language. In current practice, when the court exercises its authority to increase the number of peremptory challenges, an equal increase in challenges is given to each side. *See, Alexander, Maine Jury Instruction Manual*, § 2-13 (4th ed. 2009).

The amendment further modifies paragraph (3) of subsection (c) in two respects. In the first sentence the reference to “murder” is replaced by “punishable by life imprisonment” since the crime of aggravated attempted murder, 17-A M.R.S. § 152-A, added to the Maine Criminal Code by P.L. 2001, ch. 413, § 2, is also potentially punishable by life imprisonment. Historically, entitlement by each side to the maximum number peremptory challenges authorized by Rule 24 for any crime has been predicated upon the crime charged carrying the potential of life imprisonment as a punishment. *See generally*, 1 Cluchey & Seitzinger, *Maine Criminal Practice*, § 24.4, n. 41 at V-57 (Gardner ed. 1995); Me. Rptr. 344-351 A.2d XLIII-XLIV and LIV-LV; and Me. Rptr. 376-380 A.2d XXXII and XXXVIII. The second sentence, in addition to formalistic changes to enhance clarity, the limitation “not punishable by life imprisonment” is added since aggravated attempted murder is a Class A crime. 17-A M.R.S. § 152-A(2).

5. Rule 48, subdivision (b) of the Maine Rules of Criminal Procedure is amended as follows:

(b) By the Court.

(1) If there is unnecessary delay in bringing a defendant to trial, the court may upon motion of the defendant, or on the court’s own motion, dismiss the

indictment, information, or complaint. The court shall direct whether the dismissal is with or without prejudice.

(2) If no indictment has been returned by the grand jury within 6 months of the initial appearance of the defendant or after the 3rd regularly scheduled session of the grand jury after the initial appearance, whichever occurs first, the clerk shall enter a dismissal of the complaint, unless within the time period specified in this paragraph the attorney for the state moves to enlarge the period and shows the court good cause why the complaint should remain on the docket. The dismissal pursuant to this paragraph shall be without prejudice.

Advisory Note – 2010

M.R. Crim. P. 48(b) heading, (1) and (2). The amendment modifies subdivision (b) in three respects. First, the heading is changed from “By Court” to “By the Court.” Second, paragraph (1) of subdivision (b) is expanded to allow a trial court on its own motion to dismiss a charging instrument “[i]f there is unnecessary delay in bringing a defendant to trial.” Prior to this change, paragraph (1) permitted a dismissal only upon motion of the defendant. Paragraph (1) is designed to be the mechanism to enforce a defendant’s speedy trial right as provided by Me. Const. art. I, § 6 and U.S. Const., amend. VI and XIV. *State v. Caulk*, 543 A.2d 1366, 1369-70 (Me. 1988). Third, paragraph (2) of subdivision (b) is amended to clarify that to avoid a dismissal of the complaint by the clerk the attorney for the state must, prior to the expiration of the time period specified in paragraph (2), both move to enlarge the period and show the trial court good cause why the complaint should remain on the docket.

6. Rule 95, subdivision (b) of the Maine Rules of Criminal Procedure is amended as follows:

(b) **Docketing and Assignment.** ~~on postconviction motion for DNA analysis~~ A post-conviction motion for DNA analysis pursuant to 15 M.R.S. ch. 305-B shall be docketed by the clerk in the underlying criminal proceeding. The motion shall be assigned as provided under 15 M.R.S. § 2138(1).

Advisory Note – January 2010

M.R. Crim. P. 95(b). The amendment corrects typographical and syntactical errors.

7. Rule 96, subdivision (a) of the Maine Rules of Criminal Procedure is amended as follows:

(a) **Compliance with 15 M.R.S. § 2138(3).** Following the filing of a motion for DNA analysis, if the court finds the person to be indigent, the court may appoint counsel any time during the ~~proceeding~~ proceedings.

Advisory Note – January 2010

M.R. Crim. P. 96(a). The amendment, in addition to one formalistic change, makes two changes to more correctly reflect the substance of 15 M.R.S. § 2138(3). First, it adds the statutory precondition to the appointment of counsel that the court first make a specific finding of indigency relative to the person filing the motion. Second, it replaces the word “proceeding” with “proceedings” since 15 M.R.S. ch. 305-B provides for more than one proceeding.

8. Part XIII of the Maine Rules of Criminal procedure is added to read as follows:

XIII. POST-JUDGMENT MOTION AND HEARING FOR DETERMINATION OF FACTUAL INNOCENCE AND CORRECTION OF RECORD BASED ON A PERSON'S IDENTITY HAVING BEEN STOLEN AND FALSELY USED IN A CRIMINAL PROCEEDING; SUBSEQUENT DISCOVERY OF FRAUD OR MISREPRESENTATION

Rule 105. INITIATION OF PROCEEDINGS

(a) Person or Entity Entitled to File a Post-Judgment Motion. Any person who satisfies the prerequisites of 15 M.R.S. §§ 2181 and 2182 may file a post-judgment motion in the underlying criminal proceeding for determination of factual innocence and correction of the court records and related criminal justice agency records. The attorney for the State or a court may file the motion in behalf of a qualifying person. Filing must be in accordance with Rule 49(d) and (e).

(b) Docketing and Assignment of Post-Judgment Motion. The post-judgment motion shall be docketed by the clerk in the underlying criminal proceeding as contemplated by 15 M.R.S. §§ 2182(1) and 2183(1). The motion shall be assigned as provided under 15 M.R.S. § 2183(1).

(c) Service of the Post-Judgment Motion. Pursuant to 15 M.R.S. § 2183(1), the specially assigned judge or justice shall determine upon whom and how service of the post-judgment motion is to be made and enter an order in this regard.

RULE 106. ASSIGNMENT OF COUNSEL

(a) Compliance with 15 M.R.S. § 2183(2). Following the filing of a post-judgment motion, if the court finds the person to be indigent, the court may appoint counsel at any time during the proceedings.

(b) Determination of Indigency; Appointment and Compensation; Continuing Duty to Represent. The determination of indigency, the appointment and compensation of counsel, and the continuing duty of counsel to represent the person shall be governed by the provisions of Rules 44, 44A and 44B.

RULE 107. REPRESENTATION OF THE STATE

Representation of the State in these proceedings shall be as provided in 15 M.R.S. § 2183(3).

RULE 108. HEARING; CERTIFICATION OF RESULTS; CORRECTION OF THE RECORD

At the conclusion of the hearing held under 15 M.R.S. § 2183(5), the court shall issue a written order certifying its determination. The order must contain written findings of fact supporting the court's decision granting or denying the motion and a copy thereof shall be provided to the person, all as required under 15 M.R.S. § 2183(5). If the court grants the motion, the court shall issue an additional order

specifying the corrections to be made in the court records and the records of each of the appropriate criminal justice agencies, as provided in 15 M.R.S. § 2183(6).

RULE 109. SUBSEQUENT DISCOVERY OF FRAUD OR MISREPRESENTATION

If, subsequent to the granting of the motion, the court holds a hearing to determine fraud or misrepresentation under 15 M.R.S. § 2183(7), the court may, if it finds the existence of material misrepresentation or fraud, issue an order vacating its earlier order certifying a determination of factual innocence and modify accordingly any earlier ordered record correction, as provided under 15 M.R.S. § 2143(7).

Advisory Note – 2010

M.R. Crim. P. Part XIII and Rules 105-109. The added part containing 5 rules addresses the new statutory post-judgment relief mechanism for persons whose identities have been stolen and falsely used by another person in a criminal proceeding. *See* 15 M.R.S. ch. 308 [§§ 2181-2184], enacted by P.L. 2009, ch. 287, § 1, effective September 12, 2009. For a thorough explanation of this new relief mechanism, *see* L.D. 1179, Summary (124th Legis. 2009). Note that 15 M.R.S. ch. 308 provides post-judgment relief, not only in the context of a criminal proceeding, but also in the context of a civil violation or traffic infraction proceeding. Part XIII (Rules 105-109) addresses this post-judgment relief mechanism solely in the context of a criminal proceeding. Rule 60(b) of the Maine Rules of Civil Procedure provides general guidance in the context of a civil violation or traffic infraction proceeding.

9. These amendments shall be effective January --, 2010.

Such rules as thus adopted and amended shall be recorded in the Maine Reporter.

Dated: -----

FOR THE COURT¹

LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
JON D. LEVY
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justices

¹ This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.